

Y 1115:97-593
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SENATE

{ REPORT
No. 97-593 }

COMPLETED ORIGINAL

FOR THE RELIEF OF FRANK L. HULSEY

SEPTEMBER 28 (legislative day, SEPTEMBER 8), 1982.—Ordered to be printed

Mr. THURMOND, from the Committee on the Judiciary,
submitted the following

REPORT Y 1116:97-593

[To accompany S. 534]

The Committee on the Judiciary, to which was referred the bill (S. 534) for the relief of Frank L. Hulsey, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

PURPOSE

This bill would permit Frank L. Hulsey to file an administrative claim against the United States for injuries resulting from a swine flu inoculation administered under a government sponsored program, notwithstanding the two year limitation prescribed in 28 U.S.C. 2401 (b) for filing claims. The bill would also permit Mr. Hulsey to bring an action in Federal court if his administrative claim is denied.

STATEMENT OF FACTS

Frank L. Hulsey, age 63, was inoculated with a swine flu vaccine on October 12, 1976. This vaccination occurred pursuant to a government sponsored campaign to inoculate the public against swine flu.

According to medical records, Mr. Hulsey was an active man in good health prior to the inoculation. However, approximately eleven days after receiving the shot, Mr. Hulsey began showing signs of weakness and an inability to carry out simple daily functions such as walking up a flight of stairs. His condition continued to deteriorate until on November 13, 1976, approximately thirty days after receipt of the vaccine, he was admitted to the intensive care unit at the University Hospital with what appeared to be a rare lung infection. Mr. Hulsey spent approximately five weeks on a respirator on this particu-

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lar occasion and, as a result, was left with a 50 percent impairment of his lungs and a further weakened conditions throughout his muscle system.

After the onset of this disease, Mr. Hulsey continued to suffer other complications arising from the medications used to treat it as well as the disease itself. On January 19, 1977, he entered the hospital for the removal of a lipoma from his right hip, and during a hospital confinement in April 1978, traces of tuberculosis were found in his body.

Side effects of the drugs used to treat the disease included the development of cataracts and secondary glaucoma resulting in loss of vision in the left eye and much damage to the right. As a consequence of his condition, Mr. Hulsey was hospitalized on fifteen different occasions over the next five years, several of these admissions exceeding periods of one month.

According to the general consensus of medical officials, the fundamental problem underlying Mr. Hulsey's illness is a rare immunological disorder which attacks the muscle tissue. Although the cause of the disease, known as polymyositis, is not precisely clear, there are many similarities between this disease and others associated with the swine flu shot such as Guillian Barre syndrome. These diseases are similar not only because of their immunological mechanisms, but because they affect the neuromuscular function of the body.

However, the possibility of linkage between the swine flu administration and the polymyositis was late in occurring to the physicians who were treating Mr. Hulsey. Although they were aware the Guillian Barre syndrome was linked to swine flu administration, polymyositis is somewhat different. It was only in 1979 that they began to think about the possible relationship of the immunization and the onset, a few weeks later, of the polymyositis. Thus, Mr. Hulsey's extensive hospital confinement, and the initial inability of doctors to diagnose his illness at the outset precluded him from filing a claim against the United States before the statute of limitation, prescribed by 28 U.S.C. 2401(b), had run.

The Department of Health and Human Services recommends against favorable consideration of this bill. In its opinion, the statutory limit has been strictly interpreted by the courts, and there is no basis for providing relief to Mr. Hulsey, who is in the same position as many other persons whose claims are similarly barred. The Office of Management and Budget concurs in the views expressed by HHS, and accordingly opposes enactment of this legislation.

The Committee on the Judiciary, after careful examination of the unique circumstances surrounding Mr. Hulsey's claim, respectfully differs with the position taken by the Department of Health and Human Services and the Office of Management and Budget. The Committee is moved by the nature of the illness which could not be properly diagnosed until the statute had run. Also significant is the fact that S. 534 provides him the opportunity to have his claim properly adjudicated by the Court of Claims and provides for no direct award of compensation.

The following documents were submitted to the Senate with respect to this bill:

THE UNIVERSITY OF ALABAMA IN BIRMINGHAM,
 ASSOCIATE VICE PRESIDENT FOR HEALTH AFFAIRS,
Birmingham, Ala., June 4, 1982.

MR. BARRY BAUMAN,
Office of Senator Howell Heflin,
Washington, D.C.

DEAR MR. BAUMAN: I am writing you on behalf of Mr. Frank Hulse. I know that you are familiar with his situation. Mr. Hulse told me recently that the question had come up as to why there had been a delay in his applying for benefits related to swine flu immunization and his subsequent illness. This is explained by the fact that the possible linkage between the swine flu administration and the polymyositis was late in occurring to all of us. We were of course aware that Guillian Barre syndrome was linked to swine flu administration, but polymyositis, although very similar in its effect, is somewhat different. Thus it was only in 1979 that we began to think about the possible relationship of the immunization and the onset, a few weeks later, of the polymyositis. I hope this is a clear explanation, and if I can provide any more information to you about Mr. Hulse's situation please contact me.

Sincerely,

J. DURWOOD BRADLEY, M.D.
Professor of Medicine,
Division of Pulmonary Diseases.

THE UNIVERSITY OF ALABAMA IN BIRMINGHAM,
 SCHOOL OF MEDICINE/DEPARTMENT OF MEDICINE,
 PULMONARY DIVISION,
Birmingham, Ala., June 23, 1982.

HON. TOM BEVILL,
Congress of The United States,
Washington, D.C.

DEAR SIR: Mr. Frank Hulse has asked me, as one of the physicians involved in the care of Mr. Hulse's Guillian Barre syndrome and polymyositis to explain why we failed to draw Mr. Hulse's attention to the relationship between his illness and the flu shot until after two years had elapsed.

Had he had a typical Guillian Barre syndrome with no unusual manifestations, he would have reached within a few weeks or months a condition in which he would have been clinically stable and able to discuss the possible relationships. This was far from the case—throughout the two years and subsequently he has had the most devastating complications of the disease and of the necessary treatment. During the first two years there was really no reasonable opportunity for claim reflection on the cause of his disease. Our preoccupation and his was on the urgent daily question of management and on the probability, in my judgment, that he would not survive two years.

Furthermore, the causal relationship did not become apparent to us until very later because of the unusual severity and widespread nature of his disease, quite different from most of the flu-linked Guillian Barre. The evolution of the polymyositis and the Guillian Barre

syndrome, with a period of time to observe its course, to obtain sequential laboratory tests, and to evaluate all of the process has been necessary before with confidence we became able to establish the fundamental nature of his illness as being quite consistent with a reaction to the flu shot.

In my judgment Mr. Hulsey has in fact acted within two years of the first time at which it was medically reasonable to make an association with the swine flu and medically reasonable for him to be expected to take action.

Please let me know if I can provide more information.

Sincerely yours,

BEN V. BRANSCOMB, M.D.,
*The Alabama Professor of Medicine in
 Emphysema and Respiratory Disease.*

THE SECRETARY OF HEALTH AND HUMAN SERVICES,
 Washington, D.C., December 16, 1981.

HON. CHARLES E. GRASSLEY,
*Chairman, Subcommittee on Agency Administration,
 Committee on the Judiciary,
 U.S. Senate,
 Washington, D.C.*

DEAR MR. CHAIRMAN: This is in response to your request for a report on S. 534, a bill "For the relief of Frank L. Hulsey".

In summary, we oppose the bill, which would waive the statute of limitations for filing tort actions against the United States with respect to Mr. Hulsey's claim of injury arising out of the Swine Flu program. The time limitation in section 2401(b) of title 28, United States Code, is a jurisdictional requirement for actions brought against the United States with respect to alleged negligent acts of its employees. The statutory limit has been strictly interpreted by the courts, and there is no basis for providing relief of Mr. Hulsey, who is in the same position as many other persons whose claims are barred by the statute of limitations.

The bill would permit Mr. Hulsey to file an administrative claim against the United States for injuries allegedly resulting from a swine flu inoculation administered under a Government-sponsored program, notwithstanding the two-year limitation in 28 U.S.C. 2401(b) for filing claims. The bill would also permit him to bring an action in Federal court if his administrative claim is denied.

Section 2401(b) of title 28, United States Code, provides that a tort claim shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years of when the cause of action accrued. Prior to the adoption of the Federal Tort Claims Act, 28 U.S.C. 2671 et seq., suit against the United States for money damages, caused by Federal employees acting within the course and scope of their employment, was precluded by the doctrine of sovereign immunity. As enacted, the Federal Tort Claims Act constituted a limited waiver of sovereign immunity, which waiver has been strictly construed by the courts. While a statute of limitations is ordinarily procedural in nature, section 2401(b) is considered to be substantive inasmuch as it is part of the statute creating the cause of action. For these reasons this Department has denied any claim that has not been

timely filed. We find no reason to treat Mr. Hulsey's claim differently, nor has any reason been suggested in the bill. Furthermore, there was extensive publicity in the media with respect to Swine Flu claims. Mr. Hulsey should have had ample opportunity within the two-year period to file his claim.

We therefore recommend that the bill not be favorably considered.

We are advised by the Office of Management and Budget that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely,

DICK SCHWEIKER,
Secretary.

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